

**United States Department of Labor
Employees' Compensation Appeals Board**

G.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Clovis, CA, Employer**

)
)
)
)
)
)
)
)
)

**Docket No. 17-1169
Issued: September 19, 2017**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 8, 2017 appellant filed a timely appeal from an April 11, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from October 7, 2015, the date of the most recent merit decision, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's claim.²

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of the claim finding that it was untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal, after OWCP rendered its April 11, 2017 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

On appeal appellant argues that he submitted his request for reconsideration in a timely manner.

FACTUAL HISTORY

On August 27, 2013 appellant, then a 61-year-old rural route carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained bilateral hand, joint, and knee pain, along with left shoulder pain, as a result of duties of his federal employment. On October 24, 2013 OWCP accepted his claim for right carpal tunnel syndrome, left calcifying tendinitis of the shoulder, and bilateral enthesopathy of the wrist and carpus. Appellant received compensation payments on the supplemental rolls for intermittent disability commencing October 19, 2013 and on periodic rolls for temporary total disability commencing March 25, 2014.

On December 4, 2013 OWCP referred appellant to Dr. Ernest Miller, a Board-certified orthopedic surgeon, for a second opinion examination to determine appellant's current diagnoses and the status of his accepted conditions. In a report dated January 22, 2014, Dr. Miller diagnosed appellant with hypertension, gout, and elevated cholesterol. He found no evidence of carpal tunnel syndrome or impingement of the shoulder. Dr. Miller noted that appellant's treating physician had not provided any objective findings to support continued residuals of appellant's accepted conditions. He also noted that appellant's current symptoms were related to gout, and that there was no justification for his temporary total disability starting August 17, 2013. On physical examination, Dr. Miller found that appellant had full range of motion of the neck, shoulders, and upper extremities. Palpation of the upper extremities exhibited marked swelling of the olecranon bursa, consistent with gout.

In a report dated April 21, 2014, Dr. Sanagaram Shantharam, a Board-certified orthopedic surgeon, noted on examination of appellant's left shoulder that he had a mildly positive impingement test with pain in the biceps tendon area and normal range of motion. He diagnosed appellant with adhesive capsulitis of the shoulder and carpal tunnel syndrome. Dr. Shantharam did not include objective findings.

By letter dated November 17, 2014, Dr. Francisco Unguez, a Board-certified surgeon responded to Dr. Miller's report of January 22, 2014 and OWCP's inquiries for additional medical evidence. Dr. Unguez indicated that he did not have the capacity to write "rebuttal papers" and requested that OWCP allow him to refer appellant to orthopedic surgeons or rheumatologists in order to prepare a rebuttal. He noted that Dr. Shantharam's office had also declined to write such a report.

On July 27, 2015 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits, based on the report of Dr. Miller, which found that he had no residuals related to his accepted conditions. It noted that the weight of medical evidence rested with Dr. Miller. On October 7, 2015 OWCP finalized its decision to terminate appellant's wage-loss compensation and medical benefits.

On October 4, 2016 OWCP received a document from appellant wherein he requested that OWCP review his medical records. Appellant also noted his disagreement with Dr. Miller's

report, and his disagreement with “the basis for decision.” He also submitted a number of medical reports to the record dating from 2013 through September 13, 2016.

On January 25, 2017 appellant requested reconsideration of OWCP’s October 7, 2015 termination decision. He did not submit any evidence with his request for reconsideration.

By decision dated April 11, 2017, OWCP denied appellant’s request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, an application for reconsideration must be received by OWCP within one year of the date of OWCP’s decision for which review is sought.³ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁴

OWCP may not deny an application for review solely because the application was untimely filed. When an application for review is untimely filed, it must nevertheless undertake a limited review to determine whether the application demonstrates clear evidence of error.⁵ OWCP regulations and procedures provide that OWCP will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant’s application for review demonstrates clear evidence of error on the part of OWCP.⁶

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁷ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.⁸ Evidence which does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to demonstrate clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ This entails a limited review by OWCP of

³ 20 C.F.R. § 10.607(a).

⁴ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁵ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁶ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (February 2016). OWCP’s procedure further provides, “The term ‘clear evidence of error’ is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made a mistake. For example, a claimant provides proof that a schedule award was miscalculated, such as a marriage certificate showing that the claimant had a dependent but the award was not paid at the augmented rate.”

⁷ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁸ 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

⁹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁰ See *Leona N. Travis*, *supra* note 8.

how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹¹

The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹² In order to establish clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹³

ANALYSIS

In its April 11, 2017 decision, OWCP determined that appellant failed to file a timely application for review. Its regulations provide that the one-year time limitation period for requesting reconsideration begins on the date of the original decision.¹⁴ The last merit decision in this case was on October 7, 2015. The request for reconsideration considered by OWCP in its April 11, 2017 decision was received on January 25, 2017 which was over one year later.

However, appellant had previously submitted an undated request, received by OWCP on October 4, 2016, putting forward an argument that Dr. Miller's report was inconsistent and requesting that OWCP review his medical records. Along with the request appellant submitted a number of medical reports. OWCP, in its April 11, 2017 decision, does not reference the presence of this earlier request in the case record.

The Board finds that the undated request, received on October 4, 2016, qualified as a request for reconsideration. OWCP procedures note that the request does not have to be submitted on the appeal request form; letter format is acceptable and the word reconsideration does not need to be stated in the request for it to be considered valid, but sufficient detail should be provided to discern the decision being contested.¹⁵ Appellant submitted an argument with regard to Dr. Miller's report and requested that OWCP review his medical records. As October 4, 2016 was less than one year after the original decision of October 7, 2015, this request for reconsideration was timely.

¹¹ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹² See *Pete F. Dorso*, 52 ECAB 424, 427 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹³ See *Velvetta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁴ 20 C.F.R. § 10.607(a).

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(a)(1-2) (February 2016). See *Jack D. Johnson*, 57 ECAB 593 (2006) (the Board has held that there may be a request for reconsideration in situations where a letter does not contain the word reconsideration). See also *E.R.*, Docket No. 13-1800 (issued February 21, 2014).

For these reasons, OWCP improperly found that appellant's request for reconsideration was untimely filed. The decision of April 11, 2017 will be set aside and the case remanded to OWCP for application of the proper legal standard for reviewing timely reconsideration requests.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the April 11, 2017 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: September 19, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board